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APR 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

01-881

Re: Comments of McLeodUSA Telecommunications Service Inc.

Dear Ms. Salas:

Pursuant to request of Commission staff, McLeodUSA Telecommunications Service Inc. ("McLeodUSA") hereby resubmits its comments filed electronically on April 24, 2000 concerning the Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communication Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri.

Please date-stamp and return to us the enclosed extra copy of the filing. If you have any additional questions regarding this matter, please contact the undersigned at 202/424-7500.

Very truly yours,

Patrick Donovan
Brian McDermott

Counsel for McLeodUSA
Telecommunications Service Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 25 2001

In the Matter of)
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Application by SBC Communications, Inc.,)
Southwestern Bell Telephone Company, and)
Southwestern Bell Communications Services, Inc.)
d/b/a Southwestern Bell Long Distance for)
Provision of In-Region, InterLATA Services in)
Missouri)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 01-88

COMMENTS OF MCLEODUSA, INC.

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April 24, 2001

EXECUTIVE SUMMARY

SWBT's Application is a house of cards built on a foundation future promises of performance rather than a demonstrated track record in Missouri of compliance with §271 requirements.

A track record of compliance does not exist for SWBT in Missouri because SWBT has engaged in a pattern of anti-competitive conduct in Missouri up to the filing of, and even during its 271 application, which was designed to thwart the ability of CLECs to provide facilities-based services in Missouri. The instances of SWBT's anti-competitive conduct in Missouri leading up to its 271 application are numerous and have had a large adverse impact on CLECs.

SWBT improperly refused to recognize CLECs as participants in Missouri's Metropolitan Calling Area Plan ("MCA") by programming its switches to screen to NXX codes of CLEC MCA subscribers. This conduct was without warning to CLECs presently engaging in facilities-based competition in Missouri and/or to CLECs who had invested millions of dollars in order to do so. The result of this conduct was that CLECs were delayed or forced out of the facilities-based service market in Missouri for 18 months until SWBT had already filed its renewal 271 application with the MPSC.

In like fashion, SWBT maintained a constant policy in Missouri of individual case based ("ICB") requesting the pricing, terms and conditions under which it would collocate with CLECs. SWBT resisted every effort made by the CLECs to establish a Missouri collocation tariff. It was not until June of 2000, after SWBT had renewed its 271 application in Missouri that the MPSC opened a docket to consider requiring SWBT to file a collocation tariff. Although SWBT has filed a collocation tariff as a result of this docket, the docket is still open as no pricing has been settled. As the record before the MPSC demonstrates, and as discussed further below, the result of SWBT's ICB approach to collocation was that CLECs were charged vastly excessive rates for items pertaining to

collocation. Some of these rates were in excess of 500% more than what SWBT was charging for the same item in other states. Again the effect SWBTs conduct was that CLEC facilities-based competition was thwarted up to and during SWBTs application for 271 approval.

SWBT's 271 Application before the FCC is much different from any of SWBT's previous 271 applications. In addition to the significant amount of anti-competitive conduct engaged in by SWBT, SWBT's performance is the worst in Missouri of any state in its region. Furthermore, all of the rates for collocation and half the rates for UNE's remain interim in Missouri.

The record before the FCC clearly demonstrates that SWBT's Application should be denied.

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COMMENTS OF MCLEODUSA

McLeodUSA Telecommunications Service Inc. ("McLeodUSA") submits these comments concerning the above-captioned Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communication Services, Inc. d/b/a Southwestern Bell Long Distance (collectively "SBC" or "SWBT") for Provision of In-Region, InterLATA Services in Missouri filed October 26, 2000 ("Application").

I. INTRODUCTION

McLeodUSA is a competitive local exchange carrier ("CLEC"), providing integrated telecommunications services, including local service, to business and residential customers in first, second, third and fourth tier markets in a total of 25 states throughout the Midwest, Southwest, Northwest and Rocky Mountain regions. McLeodUSA is primarily a facilities-based provider, with 396 ATM switches, 50 voice switches, approximately 1.1 million local access lines, and more than 10,700 employees. McLeodUSA has been offering competitive local services to small and medium sized business via resale since 1994 and to residential customers since 1996. McLeodUSA has been providing facilities-based services since 1997. McLeodUSA's average business customer has 5 lines. McLeodUSA has invested over \$30 million in Missouri, having installed 3 class 5 DS-3 switches, and owning 450 route miles of fiber optic cable. McLeodUSA employs approximately 400 people and serves over 70 markets in the state. McLeodUSA currently has 5,300 business customers and 1,400 residential customers in Missouri.

The Federal Communications Commission ("FCC" or "Commission") should deny SBC's application because SBC has engaged in a pattern of anti-competitive conduct that has significantly threatened the ability of CLECs to provide facilities-based services in Missouri. As a result, SBC has very little Missouri specific performance data upon which to base its Application. Rather, SBC bases its application primarily on its 271

approval in Texas, Kansas and Oklahoma and on its future promise to perform under its just filed Missouri Interconnection Agreement and Collocation Tariff. Not only does SBC have no track record of compliance with respect to its brand new interconnection agreement and collocation tariff, both documents are in a state of flux, containing numerous interim rates terms and conditions from which SBC is presently attempting to back away via various pending dockets spun off from its Missouri 271 proceeding. SBC's Application should also be denied because what limited evidence is available indicates that SBC has failed to meet the performance requirements necessary for approval.

Because SBC has succeeded in completely thwarting McLeodUSA's attempts to offer facilities-based services in Missouri, McLeodUSA's ability to offer extensive comments relating to areas of critical import to this proceeding, such as performance measures and operational support systems, is limited. Nonetheless, McLeodUSA has had sufficient experience competing with SWBT in Missouri to enable it to confidently and strongly advocate that SWBT's application be denied. SWBT continues to engage in anti-competitive behavior in Missouri which violates the Federal Telecommunications Act of 1996 (47 U.S.C. Section 251 et seq.)(the "Telecom Act") and continues to significantly fail to meet numerous requirements set forth in the Competitive Checklist contained in Section 271(c)(2)(B) of the Telecom Act.

McLeodUSA is mindful that SBC has received 271 approval in the sister-region states of Texas, Kansas, and Oklahoma, a fact that SBC has made one of the cornerstones of its present application. However, SBC's conduct and performance in Missouri has been much different. In Missouri, SWBT has had a history of circumventing the authority of the Missouri Public Service Commission ("MPSC") and of willingly violating the Telecom Act. In order to understand the difference in SBC's conduct and performance in Missouri, and the resulting impact on CLECs, an understanding of SBC's recent history of anti-competitive conduct is crucial. This history is highlighted by

SWBT's improper refusal to recognize CLECs as participants in the Missouri Metropolitan Calling Area Plan ("MCA"). As a result of this refusal, CLECs were denied the ability to offer facilities-based service since April of 1999 until just before the Missouri Commission voted to recommend approval of SWBT's 271 application.

II. SWBT'S IMPROPER AND ILLEGAL REFUSAL TO RECOGNIZE CLECS AS MCA PLAN PARTICIPANTS DENIED MCLEODUSA AND OTHER CLECS THE ABILITY TO OFFER MEANINGFUL FACILITIES-BASED SERVICE IN MISSOURI FOR THE PAST TWO YEARS

A. The MCA Plan

The MCA plan was established by the MPSC's Report and Order in Case No. TO-92-306, Date Effective, January 5, 1993 (the "Report and Order"). The MCA plan is a two-way interexchange, geographically defined, calling service, which is charged on a flat rate. The result is the creation of various calling scopes that give MCA plan subscribers the ability to make and receive toll-free calls in the metropolitan areas of St. Louis, Kansas City and Springfield on a greatly expanded basis. The purpose of the MCA, as articulated in the Report and Order, is "to fashion new expanded calling scope services that will address existing customer complaints, desires and needs."¹ The MCA calling scopes established by the MPSC cross exchange boundaries, local calling scopes of individual exchanges and individual company boundaries.² Subscribers to MCA service are allowed to purchase unlimited interexchange calling packages at a flat rate.³

In St. Louis and Kansas City, the geographic scope of the MCA is made up of six tiers of exchanges spreading out from the MCA central exchanges. In Springfield the geographic scope of the MCA is made up of three tiers of exchanges spreading out from the MCA central exchanges. With respect to Missouri customers in Kansas City and St.

¹ MPSC Case No. TO-92-306, First Report and Order, p. 5.

² MPSC Case No. TO-99-483, Direct Testimony of Martin Wissenberg, filed Feb. 1, 2000, at p. 3.

³ *Id.* at 4.

Louis, customers in the MCA central, MCA-1 and MCA-2 tiers automatically receive mandatory MCA service. In the other tiers of all MCA exchanges MCA service is optional and customers can choose whether or not to subscribe. In the areas where MCA service is optional, such service is billed as an additive to customers' bills and is classified as a local service. Additionally, in these optional areas, MCA service is designated and provisioned through the assignment of separate NXX central office codes in each exchange. (Wissenberg Direct, p. 4.)

Pursuant to the Commission's Report and Order, all LECs within the geographic scope of the MCA are required to participate in the MCA. SWBT, however, refused to recognize CLEC prefixes as being MCA prefixes and refused to recognize CLECs as participants in the MCA with respect to facilities-based service. (Wissenberg Direct, p. 5)

B. SWBT's refusal to recognize CLECs as participants in the MCA plan, and its implementation of call screening procedures

SWBT refused to recognize CLEC prefixes as being MCA prefixes and refused to recognize CLECs as participants in the MCA with respect to facilities-based service.⁴ In order to prevent CLECs that were providing facilities-based service from participating in the MCA, SWBT instituted measures to "screen" CLEC MCA NXX prefixes and, correspondingly, programmed its switches such that CLEC MCA subscribers were not recognized as MCA participants. The result was that when an SWBT MCA subscriber called an MCA subscriber in an MCA zone, the call was processed as a local (non-toll) call if the call recipient was an SWBT customer; but the same call was processed as a toll call if the same recipient were a CLEC customer.⁵ (Direct Testimony of Edward J. Cadieux, pp.12-13). SWBT began such call screening in April of 1999 without prior

⁴ MPSC Case No. TO-99-483, Transcript of Proceeding at p. 1037 (Testimony of SWBT Witness Thomas Hughes); Wissenberg Direct at p. 5.

⁵ MPSC Case No. TO-99-483, Direct Testimony of Edward J. Cadieux, pp.12-13.

notice to the MPSC or to the CLECs affected. As a result of SWBT's conduct, SWBT's MCA subscribers were required to dial 1 plus ten digits and were assessed a toll charge to call a CLEC MCA subscriber, even though that same call required only local, seven digit, dialing and was toll-free, if the recipient was a SWBT customer. Thus, solely by virtue of the former SWBT customer's exercising a competitive choice to switch service to a CLEC, parties calling that customer began receiving toll charges for what would otherwise be free calls. (Wissenberg Direct, p. 5; Cadieux Direct pp.11-13.)

SWBT did not screen the MCA NXXs of the other ILECs, nor did SWBT apply its screening tactics to CLECs customers served via resale resold or UNE-P.⁶ (Hughes Testimony, Tr.999-1000, 1009-11.) Despite the efforts of CLECs to obtain an amicable resolution from SWBT or relief from the MPSC discussed *infra*, SWBT continued to screen CLEC MCA NXXs until finally being ordered by the MPSC to cease such conduct in September, 2000.⁷ Interestingly, this order was not forthcoming until after SWBT renewed its application with the MPSC to provide In-Region, InterLATA Services in Missouri. The effect of SWBT's MCA conduct and the resulting delay in obtaining relief from the MPSC was to virtually stifle CLEC facilities-based competition in Missouri for approximately 18 months...until SWBT had sought a favorable recommendation from the MPSC for 271 approval.

⁶ MPSC Case No. TO-99-483, Transcript of Proceedings pp. 999-1000, 1009-11 (Testimony of SWBT Witness Thomas Hughes).

⁷ MPSC Case No. TO-99-483, *Report and Order*, issued Sept. 7, 2000, effective date Sept. 19, 2000. Note, as discussed *infra*, SWBT is apparently still engaging in such screening tactics as of the date the filing of these Comments.

C. SWBT's MCA Conduct was Profoundly Anti-Competitive and Created a Barrier to Entry in Violation of Section 253 for CLECs wishing to provide facilities-based services in Missouri

SWBT's screening of CLEC prefixes and its refusal to recognize CLECs as participants in the MCA plan, made it extremely unlikely that SWBT MCA plan subscribers would be willing to change their service over to a CLEC (or remain with a CLEC after a service change).⁸ This is because in situations where the terminating party to a call has switched from an ILEC to a CLEC, the originating caller, who had always made certain calls on a local basis, found themselves having to dial 1 plus ten digits and being assessed toll rates for the same calls that used to be made toll-free with local seven digit dialing.⁹ This change in rates and dialing pattern generates customer confusion and frustration, not only for the SWBT customer who is originating the call, but for the CLEC MCA subscriber who receives call and the inevitable complaints from the call originator. As a result, MCA customers are given a strong incentive to remain with, or return to, SWBT, or risk disenfranchising parties that call them for business or personal reasons.¹⁰

The negative competitive effect of this situation upon CLECs is obvious. CLEC service was stigmatized as being inferior to SWBT service. The new CLEC MCA customer receives inferior service solely as a result of the decision to switch service from SWBT to a CLEC. SWBT's intentional discriminatory action put CLECs at a very distinct and significant competitive disadvantage when attempting to offer facilities-based products and services in competition with SWBT in Missouri MCA plan markets.¹¹

The result was that McLeodUSA was forced to delay initiating its launch of facilities-based services in Missouri until it could be confident that its facilities-based

⁸ MPSC Case No. TO-99-483, Direct Testimony of Jeff Oberschelp, filed Feb. 1, 2000, at p. 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

customers would not be discriminated against by SWBT's practices.¹² Correspondingly McLeodUSA's plans to offer facilities-based service in Missouri has been greatly thwarted. McLeodUSA, which had previously installed 3 class 5 switches in Missouri, saw its investment sitting idle because of SWBT's discriminatory, anticompetitive practice of screening calls to CLEC NXXs.¹³

D. SWBT's Refusal to Recognize CLECs as MCA Plan Participants Only With Respect to Facilities-Based Service is Extremely Disingenuous, as CLECs Have Been Providing MCA Service in Missouri Since 1996.

1. SWBT Refuses to Recognize CLECs as MCA Participants Based On an Improper Interpretation of the MCA Report and Order Establishing the MCA

The MCA Report and Order requires all LECs (not just ILECs) operating within the geographic scope of the MCA to participate in the MCA plan: "The Commission concludes that LECs should implement these plans and the affected exchanges to provide efficient and adequate interexchange calling to their customers." (MCA Report and Order p. 53) Although the MCA Report and Order makes no specific reference to CLECs, the term LEC as it is commonly used refers to both ILECs and CLECs.¹⁴ SWBT disingenuously seized upon the Report and Order's understandable lack of specific reference to "CLECs" contained in the MCA Report and Order (issued in 1992 prior to the emergence of CLECs) and refused to recognize CLECs as proper participants in the MCA service plan. This unduly narrow interpretation of the MPSC's Report and Order establishing the MCA is also squarely at odds with numerous orders issued by the Commission.

¹² *Id.* at 8-10

¹³ *Id.* at 6, 8-9

¹⁴ *See* Telecom Act, 47 U.S.C. Section 153(26), which defines a "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access."

2. The MPSC Has Authorized CLEC Participation In The MCA In Numerous Other Orders Approving Interconnection Agreements and Tariffs

SWBT's failure to provide advanced warning to CLECs or to the MPSC of its imposition of MCA screening is even more troublesome, given the fact that SWBT had previously recognized CLEC resale and UNE-P customers as MCA participants. Subsequent to the MPSC's issuance of the MCA Report and Order, but well prior to SWBT's screening of CLEC MCA NXXs, the MPSC approved numerous CLEC local exchange tariffs that offer MCA service. For example, in Case No. TO-96-440, the MPSC approved the interconnection agreement between SWBT and Communications Cable-Laying Company d/b/a Dial US ("Dial US"). As to the issue raised in that case of CLECs offering MCA Service, the MPSC held: "MCA service, where mandatory, is an essential part of basic local telephone service and as such is a part of the service that LECs must provide to competitors under the Act." (TO-96-440 Report and Order, p. 6)

Subsequently, the MPSC approved Dial US' tariffs, which offered mandatory and optional MCA service. Thus, to the extent that CLECs had entered into interconnection agreements and had tariffs approved by the MPSC that allowed them to offer MCA service, the MPSC had already authorized CLEC participation in the MCA and had already recognized CLEC MCA customers as MCA subscribers. No distinction is made in the applicable tariffs, or in any documentation submitted by SWBT, between facilities-based service and resold service, such that CLECs were provided any reasonable notice that SWBT would screen CLEC NXXs prior to the time SWBT actually began engaging in such conduct.

3. SWBT Never Objected to CLEC Participation In the MCA Until CLECs Began Offering Facilities-Based Service Which Posed a Threat to SWBT's Profits

SWBT did not oppose CLEC MCA participation in MPSC Case TO-96-440, or in conjunction with any tariffs that proposed CLEC provision of MCA service prior to its

screening of CLEC MCA NXXs. Rather, SWBT had consistently “allowed” CLECs to participate in the MCA Plan with respect to the offering of resold service, UNE-P service, and in cases where the CLEC had ported a number from SWBT. (Hughes Testimony, Tr. 999-1000, 1009-11.) Until it suddenly began screening CLEC NXX codes, it had been a foregone conclusion that CLECs were, in fact, MCA plan participants.¹⁵ Indeed the issue of CLEC participation in the MCA was never questioned by SWBT in any of the arbitrations held pursuant to Section 252(b) of the Telecom Act.¹⁶ To the contrary, in one of the arbitrations, SWBT’s Executive Director, William C. Bailey, testified before the MPSC that SWBT was not attempting to keep competitors out of the MCA, and was willing to allow CLECs to resell MCA service; the clear implication being that SWBT did recognize CLEC MCA subscribers as MCA participants.¹⁷ If SWBT did not recognize CLECs as MCA participants at the time of Mr. Bailey’s testimony, there certainly was no better time to voice this than in response to the MPSC’s questions then.

4. CLECs Were Unable to Obtain A Timely Resolution of MCA Issues From SWBT or From The MPSC

Competitive issues concerning CLEC participation in the MCA such as interpretation of the MPSC’s MCA Report and Order and regarding whether said Order created a barrier to entry for CLECs were first brought to the MPSC in early March 1998 in case no. TO-98-379. These and other competitive issues relating to the MCA were again reiterated to the MPSC in April of 1999, upon the motion of the MPSC Staff urging the MPSC to initiate Case No. TO-99-483 regarding the MCA. SWBT’s anti-competitive screening of CLEC MCA NXXs was first brought to the MPSC’s attention by AT&T with its filing of MPSC Case No. TO-2000-15 on July 13, 1999. This case, along with

¹⁵ MPSC Case TO-99-483, Direct Testimony of R. Matthew Kohly, filed Feb. 1, 2000, p.9.

¹⁶ *Id.*

¹⁷ MPSC Case No. TO-97-40 / T0-97-67, Transcript of Proceedings at p. 1444.

TO-98-379, which was filed by two small Missouri ILECs, have both sat virtually dormant with the MPSC since the time they were filed. Although most if not all of the issues raised in these proceedings were resolved by the MPSCs Report and Order in the TO-99-483 Case, it was not until late September 2000 that such Report and Order became effective. On October 18, 1999 various CLECs, joined by the MPSC Staff and Missouri Office of Public Counsel filed a non-unanimous stipulation requesting interim, expedited relief from SWBT's call screening tactics. Failing to sympathize with the CLECs and its Staffs concerns regarding the anti-competitive barrier to entry created by SWBT, the MPSC rejected the non-unanimous stipulation (approximately six weeks after it was filed) and did not even set a hearing to resolve the competitive barriers presented by SWBT's MCA Conduct until May 15, 2000.

Although SWBT began screening CLEC MCA prefixes in April of 1999, it was not until late December of that year that SWBT offered any kind of solution for CLECs wishing to engage in facilities-based competition in MCA markets. Throughout this time period McLeodUSA attempted on several occasions to obtain relief from SWBT's screening tactics and to otherwise be recognized as an MCA plan participant, but was consistently told by SWBT that, since it "was not an ILEC," McLeodUSA would not be recognized as an MCA plan participant. (Wissenberg Direct, pp. 7-8) The "solution" which was finally proposed by SWBT was merely an illegal and financially unattractive proposed memorandum of understanding (the "MOU"), which required that CLECs pay SWBT what amounted to a 2.6 cent per minute competitive loss surcharge for nothing more than the privilege of not having their MCA NXXs illegally screened by SWBT. That SWBT would float such a proposal that so clearly violated the Telecom Act and so clearly was designed for the extraction of monopoly rents from competitors, thereby blatantly confirming SWBT's monopoly grip on its local exchange markets, speaks volumes about the utter lack of competition that existed in Missouri and about SWBT's

total confidence that its anticompetitive action would go unpunished by the Missouri PSC.

5. SWBT's Proposed MOU was Neither Legal nor Economically Feasible

Under the proposed MOU, SWBT would have refrained from screening CLEC's MCA NXXs only if the CLEC agreed to pay SWBT 2.6 cents per minute per call originated from a SWBT subscriber that was terminated to a CLEC MCA subscriber. SWBT's imposition of 2.6 cents per minute "originating access charge" violates the Telecom Act in a number of ways, namely the interconnection and dialing parity provisions of Section 251 and the reciprocal compensation provisions of Section 252. SWBT clearly recognized this violation, as manifested by its specific attempt to "exempt" the MOU from these provisions by so stating in the MOU itself.

A very troubling aspect of the MOU was that it appeared to be calculated to destroy the incentive for CLECs to engage in facilities-based competition by making same cost prohibitive. After adding the MOU surcharge to the cost of providing facilities-based service, it became clear to McLeodUSA that paying SWBT's proposed 2.6 cent rate would have resulted in McLeodUSA incurring higher costs for providing facilities-based services, than for providing resale services. (Wissenberg Direct, pp. 11-14) Thus, the incentive to invest in the infrastructure necessary to provide facilities-based services was significantly reduced, if not eliminated, for CLECs, the MOU.

SWBT never sought approval from this Commission for the compensation sought in the MOU (either with respect to the nature of the compensation, i.e., an unprecedented originating access charge, or with respect to the rate charged). That SWBT would not attempt to do so is disturbing and also quite telling with respect to SWBT's motives and attitudes regarding competitive issues in Missouri.

SWBT's MOU charge of \$0.026 per minute to terminate calls from SWBT's MCA subscribers to CLEC MCA plan subscribers represents SWBT's "toll" for

recognizing CLECs as participants in the MCA plan. This charge, or, more appropriately, this “competitive loss surcharge” is nothing more than an improper revenue replacement ploy by SWBT to attempt to maintain its profit levels, even if CLECs are successful in winning over current SWBT customers in Missouri markets.¹⁸

Clearly the proposed MOU was not a viable or good faith “solution” on the part of SBC, but a token gesture, quite late in coming, designed to give SBC the appearance of attempting to cooperate. CLECs responded accordingly by refusing to enter into the MOU. The only exception to this was Intermedia Communication, which did so only as the result of being faced with significant customer losses if it did not sign.

6. SBC Has Continued its Illegal and Improper Screening of McLeodUSA MCA NXX Prefixes To This Day

Despite the fact that the MPSC ordered SBC to cease its MCA screening conduct in its September 2000 order issued in Case No TO-99-483, SBC is currently rejecting all orders from McLeodUSA for UNE-P service for McLeodUSA’s MCA customers.¹⁹ Prior to this blanket rejection policy, any McLeodUSA customers who selected MCA service in the optional tiers and who were provisioned service via UNE-P, automatically lost MCA service and had to have service re-ordered via resale.²⁰ Despite numerous attempts by McLeodUSA, SBC has not provided an adequate explanation for why this is occurring, and has not otherwise corrected the problem. SBC’s order system is rejecting all orders for UNE-P submitted by McLeodUSA on which an MCA option is indicated.²¹ The error message provided by SBC’s system to McLeodUSA indicates that an invalid

¹⁸ MPSC Case No. TO-99-483, Direct Testimony MPSC Staff Witness William Voight, Filed Feb. 1,2000, pp. 44-45.

¹⁹ Affidavit of Frank Schwartz attached hereto as Exhibit A.

²⁰ Id.

²¹ Id.

feature request has been submitted.²² Information provided by SBC's toolbar system lists available features for one FB resale and UNE-P. However, when this database is accessed with an MCA prefix the system indicates that the MCA feature is available for resale but not for UNE-P.²³ This demonstrates that SBC has either intentionally continued its improper and illegal screening of McLeodUSA's MCA and NXX prefixes, or that it has significant problems with its operational support systems ("OSS").

III. SWBT'S WILLINGNESS TO CIRCUMVENT THE AUTHORITY OF THE MPSC AND TO DISREGARD THE TELECOM ACT CREATES A VERY ANTI-COMPETITIVE AND UNCERTAIN ENVIRONMENT IN MISSOURI

Equally problematic for CLECs was SWBT's demonstrated willingness to engage in such clear discriminatory practices in violation of the Telecom Act. SWBT's screening of CLEC MCA NXXs violates the Telecom Act in numerous ways. SWBT's conduct: constitutes a barrier to entry in violation of Section 253(a); it violates the interconnection provisions of Section 251(c)(2) by lessening the quality of interconnection provided to CLECs; and it creates dialing disparity in violation Section 251(a)(3). Additionally, SWBT's attempt to force CLECs to sign the MOU violates the reciprocal compensation provisions of Sections 251(b)(5) and 252(d)(2)(A).

When faced with what it perceived as a competitive issue, namely CLEC facilities-based participation in the MCA, SWBT did not seek a clarification of the Report and Order establishing the MCA, and did not otherwise take the issue to the MPSC. Rather, SWBT unilaterally imposed a roadblock for CLECs attempting to offer facilities-based MCA service. Not only did SWBT fail to seek any kind of MPSC approval for its call screening measures, but it failed to give any advanced notice of such measures to CLECs whatsoever.

²² Id.

²³ Id.

IV. BECAUSE OF ITS ANTI-COMPETITIVE CONDUCT REGARDING THE MCA AND COLLOCATION, SBC IS UNABLE TO DEMONSTRATE A PAST TRACK RECORD OF SECTION 271 COMPLIANCE IN MISSOURI. AS A RESULT, ITS APPLICATION BEFORE THIS COMMISSION IS BASED ON PROMISES OF FUTURE PERFORMANCE IN VIOLATION OF THE TELECOM ACT.

A. Legal Standards; promises of future performance are not enough

The ability of a Regional Bell Operating Carrier (“RBOC”) to provide in-region, interLATA services is conditioned on strict compliance with section 271 of the Telecom Act. Thus, Southwestern Bell Telephone Company (“SWBT”) should not be authorized to provide in-region, interLATA service under Section 271 unless it is able to demonstrate that: (1) it satisfies the requirements for Track A or B entry;²⁴ (2) it has *fully* implemented and is *currently providing* all of the items set forth in the competitive checklist; (3) the requested authorization will be carried out in accordance with Section 272; and (4) its entry is consistent with the public interest, convenience and necessity. Telecom Act §271(d)(3). As to the *is current providing* standard, the FCC has found that promises of *future* performance have no probative value in demonstrating *present* compliance.²⁵ To support its application, an RBOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.²⁶

SWBT’s Renewed Application, however, is based largely on the promise of future performance. SWBT’s Application is also based in large part on its interLATA approval in Texas, Kansas and Oklahoma, rather than on actual compliance with 271 requirements in Missouri (which it is unable to demonstrate at present).

²⁴ RBOCs may enter an application based on one of two “tracks” established under Section 271(c)(1). Track A requires the RBOC to prove the presence of an unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers. Section 271(c)(1)(A)(I). Track B requires the RBOC to prove that no unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers has requested access and interconnection to the RBOC network within certain specified time parameters. Section 271(c)(1)(A)(II). SWBT is applying under Track A.

²⁵ FCC New York Order, ¶37. States have also adopted this standard, see *In re BellSouth Telecommunications, Inc.’s entry into InterLATA services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U, (Ga. P.S.C. Oct. 15, 1998).

²⁶ *Id.*

SBC is essentially saying that since its 271 application has been approved in Texas, Kansas and Oklahoma, that it is entitled to interLATA approval in Missouri, and then it will comply with the section 271 requirements in Missouri. Section 271 simply does not allow such a scheme. The fact that SWBT was granted interLATA entry in Texas and elsewhere should have no bearing on whether SWBT should be granted interLATA entry in the state of Missouri. Each application made by an ILEC for interLATA entry must be examined independently on its own merits, and the issue of whether an ILEC has satisfied its section 271 obligations must be determined on a case by case basis after review of a totality of circumstances of that particular application.²⁷

B. The Missouri Commission eventually acquiesced to SWBT's quid pro quo approach to a favorable section 271 recommendation. This Commission should not be so inclined.

SBC's Renewed Application for section 271 approval before the MPSC relied heavily on this Commission's approval of SBC's Texas 271 interconnection agreement ("T2A"). However, with the gall characteristic of SBC's attitude toward competition in Missouri, SBC altered many of the T2A provisions in its proposed Missouri 271 interconnection agreement ("M2A") in a way that greatly lessened the acceptability of the M2A as compared with the T2A. Indeed the evidence presented at the October and November question and answer sessions before the MPSC and in written comments following same, clearly demonstrated that SBC's proposed M2A fell far short of the T2A. Even more troubling was SBC's attitude towards the filing of its M2A. Throughout the entire 271 proceeding before the MPSC, SBC consistently and steadfastly indicated that

²⁷ *Application of Bell Atlantic Corporation, et. al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in New York*, CC Docket No. 99-295 Memorandum Opinion and Order, (December 21, 1999) ("hereinafter, "FCC New York Order"), ¶46, and *In the Matter of Application by SBC Communications, Inc., /Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, CC Docket No. 00-65 Memorandum Option and Order, FCC 00-238 (rel. Jun. 30, 2000) (hereinafter, "FCC Texas Order"), ¶46.

the actual filing of its proposed M2A was conditioned on a favorable recommendation from the MPSC concerning approval for SBC's Missouri interLATA entry.²⁸

To its credit, the MPSC initially resisted SBC's quid pro quo approach to the filing of an acceptable interconnection agreement. The MPSC essentially told SBC in no uncertain terms that until SBC filed an M2A which more closely conformed to the T2A, that the MPSC would withhold a favorable recommendation on SBC's renewed application.²⁹ However, when SBC finally filed its new and improved M2A, the MPSC promptly issued a favorable recommendation for SBC's renewed application. The MPSC issued its favorable recommendation despite the fact that virtually all the CLECs and, most notably the Missouri Office of Public Counsel and the Missouri Attorney General's Office, strongly suggested that the MPSC wait for a period of time to determine whether SBC could actually comply with the terms of, the M2A. Because the MPSC failed to require SBC to demonstrate any sort of track record of compliance with the newly filed M2A, the MPSC thereby essentially acquiesced to SBC's quid pro quo approach. The MPSC's initial objection to such approach, thus, now stands as nothing more than a meaningless issue of semantics (with absolutely no benefit to the CLEC community or to Missouri consumers) as to whether the filing of the M2A came before the MPSC's favorable recommendation or not.

As a result, SBC got precisely what it wanted: a favorable recommendation from the MPSC on its renewed 271 application without ever having to operate under its M2A or having to demonstrate that it could or would comply with the terms and conditions contained in same.

In the wake of SBC's conduct regarding the MCA, CLECs are rightfully left to question when SBC will issue its first M2A surprise, i.e., when will the next MCA-like

²⁸ Testimony of SWBT witness Becky Sparks Transcript of Proceedings October 11-12, 2000, Case No. TO-99-227, ("tr.") p. 2597.

²⁹ MPSC Case No. TO-99-227, Transcript of Proceedings, p. 3108.

shoe drop. Indeed, the stage has certainly been set for the next anti-competitive shoe to drop. Many of the rates contained in the T2A are only interim, and there are no less than four dockets pending before the MPSC which have been set to determine additional issues concerning rates, terms and conditions for unbundled network elements (“UNEs”), collocation, DSL loop conditioning, and line sharing and line splitting. The Federal Communications Commission “FCC” or (the “Commission”) has determined that prices for unbundled network elements (“UNEs”) must be based on the total element long run incremental cost (“TELRIC”) of providing those elements.³⁰ The Missouri PSC has yet to set TELRIC-based rates in each of the various dockets spun off from SBC’s renewed 271 application in Missouri, namely UNE, collocation, DSL loop conditioning and line-sharing and line-splitting. These dockets demonstrate that the M2A is far from settled and that SBC is already attempting to backslide even before receiving 271 approval from this Commission. This creates a very uncertain competitive environment for CLECs in Missouri.

C. The evidence presented overwhelmingly demonstrates that SWBT has failed to meet the standards set forth in the Telecom Act and in FCC orders interpreting same.

Specifically:

- a. SWBT has failed to provide collocation consistent with the FCC’s requirements;
- b. SWBT fails to provide interconnection in accordance with the requirements of Section 251(c)(2) and 252(d)(1);
- c. SWBT fails to provide nondiscriminatory access to its network elements including its operations and support systems (“OSS”);
- d. SWBT fails to provide nondiscriminatory access to unbundled loops including DSL capable loops as required by the FCC’s UNE remand and line sharing orders;³¹

³⁰ *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. for authorization to provide in-Region, InterLATA services in Massachusetts*, CC Docket No.01-9, Memorandum, Opinion and Order, FCC 01-130 (Apr 16, 2000) (“Verizon MA 271 Order”).

³¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Notice of Proposed Rulemaking*, FCC 99-238, CC Docket No. 96-98 (rel. Nov. 5, 1999) (*UNE Remand Order*) and *Deployment of*